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Bottorff

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

In re Vaughan & Bushnell Manufacturing Company

Serial No. 76/037,642

Howard N. Aronson of Lackenbach Seigel for Vaughan & Bushnell Manufacturing Company.

Karen Elizabeth Bracey, Trademark Examining Attorney, Law Office 116 (Meryl Hershkowitz, Managing Attorney).

Before Simms, Hanak and Bottorff, Administrative Trademark Judges.

Opinion by Bottorff, Administrative Trademark Judge:

Applicant seeks registration on the Principal Register of the mark BLUEMAX (in typed form) for goods identified in the application as "hand tools, namely, framing hammers."¹

¹ Serial No. 76/037,642, filed May 1, 2000. The application is based on use in commerce under Trademark Act Section 1(a), 15 U.S.C. §1051(a), and April 11, 2000 is alleged in the application as the date of first use of the mark anywhere and the date of first use of the mark in commerce.

The Trademark Examining Attorney has issued a final refusal of registration on the ground that applicant's mark, as applied to applicant's goods, so resembles the mark BLUEMAKS, previously registered (in typed form) for "sawblades for circular power saws,"² as to be likely to cause confusion, to cause mistake, or to deceive. See Trademark Act Section 2(d), 15 U.S.C. §1052(d).

Applicant has appealed the final refusal. Applicant and the Trademark Examining Attorney filed opening briefs on appeal, but applicant did not file a reply brief and did not request an oral hearing. We affirm the refusal to register.

Our likelihood of confusion determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours and Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In considering the evidence of record on these factors, we keep in mind that "[t]he fundamental inquiry mandated by §2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks." *Federated Foods, Inc. v.*

² Registration No. 2,371,577, issued on July 25, 2000.

Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976).

We find that applicant's mark and the cited registered mark are similar when compared in their entirety in terms of appearance, sound, connotation and overall commercial impression. The marks could be and likely would be pronounced identically. The marks look the same except for their different (but phonetically identical) terminal letters, i.e., "KS" versus "X"; overall, we find that the marks look more similar than dissimilar. The connotations of the respective marks are not immediately apparent and perhaps are not identical, but we cannot conclude that they are dissimilar.³ Viewed as a whole, we find that the marks are sufficiently similar in terms of their overall commercial impressions that confusion is likely to result if the marks are used on similar or related goods. Applicant has presented no argument to the contrary in its brief on appeal.

³ Applicant has submitted copies of several third-party registrations of other BLUE MAX marks, but we have given this evidence little weight. The goods identified in these registrations are far afield from the goods involved in this case. In any event, third-party registrations are not evidence that BLUE MAX-type marks are widely used or weak, for purposes of the sixth *du Pont* factor ("the number and nature of similar marks in use on similar goods"). See *Olde Tyme Foods Inc. v. Roundy's Inc.*, 961 F.2d 200, 22 USPQ2d 1542 (Fed. Cir. 1992). Nor do these registrations shed any light on the meaning or connotation of BLUE MAX as applied to the goods at issue.

We turn next to a comparison of the goods, and of the trade channels and classes of customers for the goods. It is not necessary that the respective goods be identical or even competitive in order to support a finding of likelihood of confusion. Rather, it is sufficient that the goods are related in some manner, or that the circumstances surrounding their marketing are such, that they would be likely to be encountered by the same persons in situations that would give rise, because of the marks used thereon, to a mistaken belief that they originate from or are in some way associated with the same source or that there is an association or connection between the sources of the respective goods. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984); *In re Melville Corp.*, 18 USPQ2d 1386 (TTAB 1991); *In re International Telephone & Telegraph Corp.*, 197 USPQ2d 910 (TTAB 1978).

Applying these principles in this case, we find that the "hand tools, namely, framing hammers"⁴ identified in the application are sufficiently related to the "sawblades for circular power saws" identified in the cited registration

⁴ The record shows that a "framing hammer" is a relatively heavier hammer (vis-à-vis a normal, all-purpose claw hammer), used for more heavy-duty jobs.

that source confusion is likely to result from use thereon of the similar marks involved in this case. The Trademark Examining Attorney has submitted several third-party registrations which include, in their respective identifications of goods, both hammers and sawblades for power saws. Although these registrations are not evidence that the marks shown therein are in commercial use, or that the public is familiar with them, they nevertheless are probative evidence to the extent that they suggest that the goods identified therein are of a type which may emanate from a single source under a single mark. See *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); *In re Mucky Duck Mustard Co., Inc.*, 6 USPQ2d 1467 (TTAB 1988). These third-party registrations weigh in favor of a finding of likelihood of confusion.

Moreover, although applicant's and registrant's respective goods are not identical or competitive, they nonetheless are related because they are basic tools (or components thereof)⁵ which would be purchased and used by

⁵ We are not persuaded by applicant's argument that the goods are unrelated because applicant's hammer is a stand-alone tool while registrant's sawblade is not a stand-alone tool but rather is a component of a tool. There is no basis in the record for finding that consumers would distinguish the source of the respective goods on that basis. Registrant's sawblades are used as components of circular power saws, but they can be sold separately, i.e., as stand-alone items.

any handy homeowner or do-it-yourselfer. See, e.g., the Consumer Reports article (attached to the Trademark Examining Attorney's denial of applicant's request for reconsideration) which identifies the hammer and the circular power saw as two of the ten essential tools for any home workbench.⁶ These tools could and would be used together for any building or home improvement project involving wood or lumber. For example, a homeowner building a wooden fence or a deck would use both a circular power saw (including, obviously, the sawblade component of such saw) and a framing hammer to complete the project. Given the complementary nature of these goods, a consumer familiar with applicant's mark as used on framing hammers is likely to assume, upon encountering a similar mark used on sawblades for circular power saws, that the goods emanate from a single or related source.

Additionally, these goods are sold in the same trade channels and would be encountered there by the same purchasers, including ordinary consumers. The evidence of record shows that both hammers (including framing hammers) and circular power saws (and replacement blades therefor) are sold in retail hardware and home improvement stores, as

⁶ The article specifically recommends that the homeowner have a framing hammer in addition to a more general-purpose hammer.

well as via online tool suppliers. Applicant asserts that the goods are sold in different aisles of the hardware store, but even if that is so, it is not dispositive in view of the related and complementary nature of the goods themselves. Moreover, we note that the Lowe's advertising circular (attached to the Trademark Examining Attorney's denial of applicant's request for reconsideration) depicts framing hammers and circular saws and other power tools on the same and adjoining pages. On the tool websites, as well, the link upon which the shopper clicks to view the power tools offered by the seller is usually depicted on the screen adjacent to the link which is clicked to view the seller's hand tools. On one such website, the link to power tools is identified by a picture of a circular saw and the adjacent link to hand tools is identified by a picture of a hammer. Based on this evidence, we find that the types of goods involved here are marketed in the same trade channels, a fact which supports a finding of likelihood of confusion. See *In re Majestic Distilling Co.* 315 F.3d 1311, 65 USPQ2d 1201 (Fed. Cir. 2003).

Applicant contends that there have been no reported instances of actual confusion between applicant's mark and registrant's mark, despite over two years' concurrent use of the marks. Even assuming that this is true (and, of

course, we have not heard from registrant on this point), we cannot conclude on this record that the opportunity for actual confusion has been so great that its absence is factually surprising or legally significant. See *Gillette Canada Inc. v. Ranir Corp.*, 23 USPQ2d 1768 (TTAB 1992). In any event, absence of actual confusion is but one factor in our likelihood of confusion analysis, and even if that factor weighs in applicant's favor in this case, we find that it is outweighed by the other likelihood of confusion factors which support a finding of likelihood of confusion.

In summary, after carefully reviewing the evidence of record pertaining to the relevant *du Pont* factors, we conclude that a likelihood of confusion exists. We have considered all of applicant's arguments to the contrary, including any arguments not specifically discussed in this opinion, but are not persuaded of a different result. We resolve any doubts as to the correctness of our decision against applicant. See *In re Hyper Shoppes (Ohio) Inc.*, 837 F.2d 840, 6 USPQ2d 1025 (Fed. Cir. 1988); *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

Decision: The refusal to register is affirmed.